Conservatively, then, a CLEC providing its own transport must invest approximately $2 million in equipment and outside plant placement before the first customer is served by a single office.[226] Based upon the number of lines served by such a configuration, the required investment is well in excess of $300 per line.[227] In addition to these costs, CLECs will experience significant delays in acquiring and deploying all of this dedicated transport equipment.

In light of these delays and huge up-front costs, it is not surprising that the Commission concluded in the *First Report and Order* (¶ 441) that "[a]n efficient new entrant might not be able to compete if it were required to build interoffice facilities where it would be more efficient to use the incumbent LEC's facilities."[228]

**b. Third-Party Vendors Are Not A Sufficient Alternative To Unbundled Dedicated Transport.**

Excessive access charges have created a niche market for bypass of incumbent LEC access services in some of the most lucrative local telecommunications markets. Such bypass has caused competitive access providers to deploy their own transport facilities between some

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[226] *Id.* ¶ 39.

[227] *Id.*

[228] The Commission also has sought comment on whether dark fiber should be unbundled. AT&T on several previous occasions has demonstrated to the Commission the need for unbundled dark fiber. If a CLEC is forced to replicate a transmission facility where the incumbent LEC already has deployed unlit fiber, the CLEC will incur all of the self-provisioning costs and delays described above. *Id.* ¶ 39 n.13. These delays and costs would impair a CLEC's ability to offer service, and it is impossible to justify such an enormous waste of time and resources when the incumbent LEC is not using the dark fiber and has no immediate plans to do so. Indeed, many state commissions have ordered incumbent LEC's to unbundled dark fiber, and the federal courts have repeatedly upheld their determinations. *See, e.g., Southwestern Bell Tel. Co.* v. *AT&T Communications, Inc.*, 1998 WL 657717, *5 (W.D. Tex. 1998) ("the fact that *many* other state commissions have provided for the unbundling of [dark fiber] is strong, if not conclusive, evidence that the [state commission] did not act arbitrarily or capriciously" in requiring the incumbent LEC to unbundle its dark fiber) (emphasis added).

incumbent LEC end offices. In those instances where alternative providers have excess transport capacity, they have offered to lease that capacity to other carriers. The existence of these providers, however, does not imply that third-party transport is widely available in quantities necessary to support a competitive local market. In reality, the vast majority of AT&T's transport – approximately 82 percent – is provided by incumbent LECs.[229] When the transport provided by MCI is excluded (because MCI likely will make internal use of its own capacity on a going-forward basis) approximately 94 percent of dedicated transport is provided by incumbent LECs.[230]

As to the remaining providers, their limited capacity cannot possibly provide a meaningful alternative to unbundled dedicated transport. It is one thing to conclude that third parties provide dedicated transport in a particular area, and quite another to find that competitive alternatives are available for the specific dedicated transport routes that the CLEC requires.[231] For third-party dedicated transport to serve as a true substitute for unbundled dedicated transport, third parties would have to provide dedicated transport along all the existing routes between end offices, tandem switches, CLEC points-of-presence, and customer premise switches on which CLECs may need to rely.[232] No market even approaches that degree of third-party dedicated transport availability.

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[229] Beans/Harris/Stith Aff. ¶ 40.

[230] *Id.*

[231] A truly competitive market for third-party transport would contain at least two providers of dedicated transport capable of providing complete coverage to a large geographic area.

[232] *Id.* ¶ 41.

Moreover, Section 251 does not impose unbundling obligations on third-party providers, and there is thus no assurance that they will continue leasing capacity to other carriers, especially as demand for their own local services increases. In addition, AT&T's experience indicates that it typically takes from two months to two years to establish a relationship with an alternative provider, and, in some instances, these negotiations have dragged on for years without reaching agreement.[233]

In short, the Commission's previous conclusion that unbundled dedicated transport would reduce barriers to entry is just as valid today as it was in 1996.[234] The availability of unbundled dedicated transport remains "essential to [a CLEC's] ability to provide competing telephone service."[235] The theoretically available alternatives – self-provision and third-party vendors – entail excessive costs, delays, and limitations on the CLECs' addressable customer base, and thus do not provide CLECs with a commercially viable means to bring broad-based competition to the local market.

### 3. Dedicated Transport Made Available Through Existing Incumbent LEC Access Tariffs Is Not Material To The Section 251(d)(2) Analysis.

In the *First Report and Order*, the Commission correctly recognized that special access services are not a reasonable substitute for unbundled dedicated transport, and held that "existing tariffs for transport and special access services filed pursuant to [its] Expanded Interconnection rules [do not] fulfill [incumbent LECs'] obligation to implement the requirements of section

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[233] *Id.* ¶ 43.

[234] *See First Report and Order* ¶ 440 ("We anticipate that these requirements will reduce entry barriers into the local exchange market by enabling new entrants to establish efficient local networks by combining their own interoffice facilities with those of the incumbent LEC").

[235] *Id.* ¶ 449.

251(c)."[236] Nevertheless, some incumbent LECs likely will argue that CLECs can use special access services as a substitute for unbundled dedicated transport.

As a threshold matter, the extent to which dedicated transport may be available through incumbent LEC access tariffs is irrelevant to the Commission's consideration of whether to order unbundling. As the Commission has held, incumbent LECs may not "avoid Section 251(c)(3)'s unbundling obligations by offering unbundled elements to end users as retail services" at higher, non-cost-based prices.[237] The Eighth Circuit likewise "agree[d] with the FCC that such an interpretation would allow the incumbent LECs to evade a substantial portion of their unbundling obligation under subsection 251(c)(3)."[238] In all events, the reality is that application of the tariffed access rates would limit the ability of CLECs to deploy their own switches or OS/DA platforms at certain customer volumes that would otherwise support the use of such facilities. Special access services are not cost-based and are not subject to competitive pricing discipline. Indeed, month-to-month plans usually impose rates that are significantly higher than unbundled dedicated transport rates.[239] Even if a CLEC agrees to a multi-year commitment, the tariffed rates for special access often continue to exceed current unbundled dedicated transport

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[236] *Id.* ¶ 448.

[237] *First Report and Order*, ¶ 287.

[238] *Iowa Util. Bd.* v. *FCC*, 120 F.3d 753, 809 (8th Cir. 1997).

[239] Beans/Harris/Stith Aff. ¶ 44 and Attachment 1 thereto (showing that monthly special access rates for DS1 channel mileage without multiplexing range from a low of 157% to a high of 412% of dedicated transport rates in Texas, from a low of 82% to a high of 239% in New York, from a low of 609% to a high of 958% in Michigan, from a low of 149% to a high of 402% in Georgia, from a low of 255% to a high of 377% in California, and from a low of 99% to a high of 100% in Colorado). In addition, unbundled transport rates may not even properly reflect TELRIC, which is why the special access rates in Colorado are generally lower than the network element rates for transport.

prices by significant percentages.[240] These multi-year plans also create an additional barrier to entry because they involve a substantial commitment that reduces the CLECs' ability to exit the market.

Indeed, the inadequacy of access tariffs is revealed by one of the incumbent LEC's own cost models – the Telcomp cost model proposed by BellSouth. As shown elsewhere, this cost model is fatally flawed and by substantial margins understates the costs to CLECs of entering local markets and overstates the potential returns.[241] If it nonetheless is used to estimate the impact of an increase in dedicated transport costs, it shows that a mere 30 percent increase in such costs would more than double the number of customers that a CLEC using its own switch would have to capture in order to justify entering a local market like Atlanta, Georgia.[242] Further, the model shows that an 80 percent increase in dedicated transport costs would force a CLEC to capture *a majority* of the target market,[243] which is not a realistic probability. Accordingly, the incumbent LECs' own highly loaded model shows that the excessive mark-ups imposed by special access rates – higher than 900 percent in one instance – would preclude competitive entry under a wide range of network configurations.

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[240] *Id.* (showing that special access term rates for DS1 channel mileage without multiplexing range from a low of 120% to a high of 295% of dedicated transport rates for a five year term in Texas, from a low of 53% to a high of 155% for a seven year term in New York, from a low of 338% to a high of 611% for a five year term in Michigan, from a low of 113% to a high of 259% for a six year term in Georgia, and from a low of 92% to a high of 100% for a five year term in Colorado). Long term contracts are not available in California. *See id.*

[241] Klick/Pitkin Aff. ¶ 68.

[242] *Id.* ¶ 14 (showing that a 30 percent increase in dedicated transport costs would require an increase of 125 percent in customer penetration).

[243] *Id.*

## G. Operator Services, Directory Assistance, And Directory Listings.

No one disputes that local operator services and directory assistance (collectively "OS/DA") services are integral components of any significant local service offering. Any CLEC entry offering must ensure that the CLEC's customers can obtain the local OS/DA services that they have come to expect from the incumbent. Similarly, CLECs must have access at cost-based rates to the incumbent LECs' emergency and directory assistance listings, including timely and efficient updates of those listings, in order to provide the quality of service local customers expect.

### 1. The Commission Should Require Incumbent LECs To Unbundle OS/DA Services Until Customized Routing Solutions Are Broadly Deployed.

Without access to incumbent LEC OS/DA services, CLECs that use unbundled switching would have to self-provision their own OS/DA platforms and obtain customized routing of their local OS/DA traffic from numerous incumbent LEC local switches to their platforms.[244] AT&T

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[244] The only viable alternative to self-provision – access to the incumbent LEC's local OS/DA services under Section 251(b)(3) – is not relevant to the unbundling analysis. *See supra* Section IV.F.3. In any event, even if such access could be considered, it would not eliminate the impairment unless the Commission confirms that the nondiscrimination requirement of Section 251(b)(3) requires incumbent LECs to provide access to their OS/DA services at TELRIC-based rates. This result is compelled by the language of the Act and the Commission's conclusions in the *First Report and Order* (at ¶¶ 672) and Second Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 19392 (1996) (at ¶ 101) that (i) an incumbent LEC's cost of providing service equals TELRIC and (ii) the nondiscriminatory access requirement of Section 251(b)(3) applies to pricing provisions as well as other terms and conditions. *See* 47 U.S.C. § 251(b)(3) ("[t]he duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays"); *see also* 47 C.F.R. § 51.217 (explicitly defining nondiscriminatory access to include "the rates, terms, and conditions" that carriers charge one another for OS/DA calls and directory listings). The incumbent LECs, however, dispute that OS/DA access must be at TELRIC, and therefore would not offer such rates. Without confirmation from the Commission that TELRIC rates are required under Section 251(b)(3), and in the absence of broadly deployed customized (continued . . .)

has pursued this strategy during interconnection agreement negotiations and state arbitrations, but most incumbent LECs have not yet broadly implemented technical solutions that permit customized routing.

In AT&T's experience, it takes between one and two years to roll out either an Advanced Intelligent Network ("AIN") or Line Class Code ("LCC") customized routing solution – the only two practical alternatives available today.[245] Under either approach, the entrant and incumbent LEC must (i) negotiate the technical details of the solution, (ii) design a test plan, (iii) deploy the facilities and perform the necessary changes in switch software, (iv) perform the test, and (v) resolve any problems encountered during the test. Once those hurdles have been overcome, the solution must be deployed at all the switches where customized routing may be needed. Equally critical, the incumbent LEC must modify and confirm the readiness of its systems so that orders providing for routing of customer OS/DA traffic to a self-provisional CLEC platform will be accepted and processed accurately by the incumbent LEC.

In Texas, it took AT&T and SWBT two years to implement an AIN solution for routing local OS calls to AT&T toll operators. That solution did not include local DA call routing, an additional capability that would have required more time to implement. AT&T and SNET used an LCC solution to facilitate AT&T's local entry in Connecticut. That approach required 12

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routing, incumbent LECs would be free to charge excessive fees for access to their OS/DA services that would limit CLECs' ability to provide service.

[245] An LCC approach requires the incumbent LEC to hardcode into its switches the necessary information to route local OS/DA traffic from the incumbent LEC end office to the appropriate local OS/DA platform. AIN relies instead on out-of-band signaling to route local OS/DA traffic.

months to implement even though Connecticut has an extremely small base of deployed end office switches and no tandem switches.[246]

Incumbent LEC interconnection agreements and Statements of Generally Available Terms and Conditions ("SGATs") frequently indicate that the incumbent LEC provides customized routing. As AT&T's experience demonstrates, however, a "promise" to provide customized routing is just a promise until the testing and deployment necessary to make customized routing available to CLECs is completed. Until customized routing solutions have been tested and are broadly deployed, the Commission should require incumbent LECs to unbundle their OS/DA services as a UNE. This is especially true given that some incumbent LECs, such as Pacific Bell, have continued to insist until recently that customized routing was not even technically feasible.[247]

### 2. CLECs Would Be Impaired Without Nondiscriminatory Unbundled Access To Incumbent LEC Emergency And Directory Assistance Listings.

Emergency and directory listing information is a crucial component of any CLEC local service offering. Without access to this data at parity with incumbent LECs, entrants would be placed at a tremendous competitive disadvantage in their ability to win customers.

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[246] The Commission should expect that LCC solutions in other states would take substantially longer to implement because the complexity of the solution would increase as the number of Number Plan Areas ("NPAs") and tandem switches rise, primarily due to the need for additional direct trunks.

[247] *See Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks, et al.*, R.93-04-003, *et al.*, "Administrative Law Judge's Ruling Following the Technical Feasibility Workshop on Unbundled Switching Custom Routing" (Cal. PUC, March 1, 1999). After lengthy technical trials, a state arbitration award in AT&T's favor, and a California Public Utility Commission decision ordering switch unbundling and routing for DA and OS traffic, Pacific Bell announced on May 10, 1999 that it is now willing to route local DA traffic to AT&T's platform, as AT&T requested back in 1996.

Consequently, the Commission should clarify that (i) CLECs may obtain at TELRIC the initial directory listings and nondiscriminatory updates, in daily electronic batch files, (ii) CLECs may obtain emergency listings and nondiscriminatory updates on the same terms that the incumbent LEC provides such updates to itself, and (iii) incumbent LECs cannot impose restrictions on CLECs' use of directory listings.

As the Commission has long recognized, emergency services are of paramount importance.[248] CLECs are dependent on incumbent LECs to provide the names and current telephone numbers and updates for emergency agencies (such as Public Safety Answering Points ("PSAPs") or Emergency Service Boards ("ESBs")) to be stored in its Call Servicing Information Delivery System ("CSIDS") database.[249] Currently there is no national emergency database that all carriers can utilize to obtain accurate emergency listings and there are no rules or formal processes that explicitly require incumbent LECs to provide emergency listing information.

Access to the E911 platforms used by the incumbent LECs does not eliminate AT&T's need for nondiscriminatory updates of emergency listing information. Although "911" is the primary dialing protocol for emergencies in many parts of the country, customers often dial "0" in an emergency, and AT&T's operators must be able to provide them with the best possible information. Obviously, if AT&T's CSIDS database contains inaccurate information, the consequences to the customer could be dire. For the sake of consumer welfare and in order to

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[248] *See, e.g.*, Report and Order and Further Notice of Proposed Rulemaking, *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 11 FCC Rcd 18676 ¶¶ 1-2 (1996).

[249] CSIDS contains telephone numbers for these official agencies including Fire, Police, Sheriff, State/Highway Patrol, Ambulance, Coast Guard, Forest Fire, and Poison Control.

eliminate a significant competitive disadvantage, the Commission should clarify that the nondiscrimination requirement of Sections 251(c)(3) requires incumbent LECs to provide CLECs, at TELRIC rates, with their emergency listings as well as updates of those listings in a nondiscriminatory format and in the same time interval that the incumbent LEC updates its own operator emergency databases. The failure to do so would degrade CLECs' service in a manner which consumers would clearly notice and care about, and therefore would impair a CLEC's ability to offer local service.[250]

Further, while ordinary directory listings, by contrast, may not be a matter of life or death, customers calling for directory assistance likewise expect to receive complete and accurate information. By virtue of their historic local monopolies and exclusive control over the service ordering process, incumbent LECs have the most accurate, up-to-date directory listing information available.[251] While alternative sources of directory listings exist, those sources are not as accurate and are not updated as frequently as the incumbent LECs' listings. A recent spate of articles and television stories has highlighted this disparity and the consumer dissatisfaction with alternative directory assistance providers.[252]

Third party sources of directory listings are inherently inferior for obvious reasons. First, incumbent LEC directory assistance databases are updated at least daily and often on a real time basis as the incumbent LECs complete their service order processes. Third parties, by contrast,

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[250] *See* Hubbard/Lehr/Willig Aff. ¶ 39.

[251] *See, e.g.*, Russ Mitchell, "You may want to call 911 after 555-1212," *US News & World Report* (March 8, 1999) ("Local phone companies have the best lists of up-to-date phone numbers, because they control all the lines in their territory, and customers tell them when they move").

[252] *See, e.g., id.*

usually obtain their data from non-incumbent LEC sources such as yellow pages databases, scanned white page listings, United States Postal Service change of address forms, motor vehicle registration records, and voter registration records. Some of these sources are updated just once a year and all involve a delay significantly longer than a single day.[253]

Second, alternative data sources often do not include unlisted customers. This is a critical quality difference because a CLEC will be unable to distinguish between unlisted customers and customers listings that do not exist. In other instances, third party data may include customer listing information but fail to indicate that the customer should be unlisted.[254] Those oversights may result in unintentional public disclosure of private information.

Some incumbent LECs have sought to restrict access to their current directory listings through various anticompetitive tactics.[255] One such tactic requires CLECs to access the listings through a data dip process. Under this arrangement, the CLEC queries the incumbent LEC's directory assistance database each time it needs to obtain a listing. Such a restriction places entrants at a significant competitive disadvantage because (i) they are forced to incur costs not borne by the incumbent LECs (*e.g.*, network trunking costs to connect to the incumbent LEC's database), (ii) the time to complete a directory assistance inquiry is delayed through external "look-up" process, and (iii) the CLEC is constrained in its ability to design its own services when

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[253] Larger incumbent LECs often have agreements with their contiguous smaller incumbent LEC neighbors that provide the larger incumbent LECs with exclusive access to small incumbent LECs' directory assistance listings. Third parties and entrants, however, must incur the extra expense of collecting that data in order to provide their customers with the same scope of coverage and even then they cannot provide the same degree of accuracy.

[254] *See, e.g.*, Mike Mills, "Assistance: Directory Information Woes," *Los Angeles Times*, Business at 22 (October 7, 1997).

[255] *See, e.g., id.* at 22.

it does not have batch access to all directory listing information.[256] Further, it would be a logistical nightmare for a CLEC to develop the interfaces necessary to perform the look-ups, given that each incumbent LEC may have different systems and each CLEC directory listings agent would need to have access to all of those systems in order to handle customers' inquiries.[257] Incumbent LECs typically charge between $0.05 and $0.07 per data dip, charges that could cost a national CLEC tens of million of dollars per year in excessive fees.[258]

A few incumbent LECs do provide full electronic copies of their directory databases as well as daily updates, but they do so at rates far above the cost of providing that data. Bell Atlantic's directory listing tariff in New York demonstrates that an incumbent LEC's maximum possible cost of providing directory listings, including a normal rate of return, is less than $0.009 per listing and $0.012 per daily listing update.[259] Nevertheless, it has been AT&T's experience

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[256] With access to directory listings through a data dip process, AT&T could not provide, for example, full address listing services.

[257] Both the incumbent LEC and the CLEC incur costs associated with performing the directory assistance services, but those costs are distinct from the directory listing costs.

[258] Under the data dip approach, each time the CLEC receives a directory assistance request from a customer it would need to pay the incumbent LEC for a data dip. If one thousand directory listing requests are made in a year regarding the number for a particular local service customer – and one thousand directory assistance inquiries regarding the telephone number for many businesses, organizations, and government agencies is a low figure – the CLEC would pay the incumbent LEC one thousand times *for the same listing*. The incumbent LEC, on the other hand, simply looks the number up in its directory listing database each time without incurring the data dip costs.

[259] The first calculation assumes 11 million Bell Atlantic analog access lines in New York, with 15 percent of those lines being unlisted. Under its amended directory listing tariff, (New York Tariff No. 916-Telephone, Section 5.8.8(A)(4)(a)), Bell Atlantic is permitted to assess a one-time charge of $83,341 for its published listing, which yields a per listing charge of $0.0089: $83,341/(11 million lines * 85 percent) = $0.0089 per listed line. The daily update rates uses the $3,866 charge Bell Atlantic is allowed to assess monthly for providing daily updates, (*see* New York Tariff No. 916-Telephone, Section 5.8.8(A)(4)(b)), and assumes a 35 percent annual churn rate: ($3,866 * 12 months)/(11 million lines * 35 percent) = $0.012 per daily update. This 35 (continued . . .)

that incumbent LECs routinely charge between $0.02 and $0.06 per listing. In other words, CLECs often are paying a mark up well in excess of 500 percent for each listing. These charges stand in stark contrast to the California PUC requirement that incumbent LECs share directory listing information with CLECs and charge only the cost of transferring the media to CLECs.[260] For a carrier providing national service, the absolute cost generated by these excessive charges is enormous. For *each penny* the incumbent LECs overcharge, a national CLEC can be expect to incur over $1.25 million each year in unjustifiable directory listing update costs with no incremental benefit to consumers.[261]

An additional impairment arises from the fact that incumbent LECs frequently place limits on how their competitors can use their directory listings, including prohibitions on their use in marketing or posting on the Internet. The incumbent LECs, however, use the same directory listings in the very ways they prohibit CLECs from doing, whereas the Commission has held that CLECs may use unbundled network elements in any technically feasible manner.[262]

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percent churn rate most likely overstates the actual update cost because it is common industry practice to use a *monthly* churn rate of 10 percent, which would yield a $0.0035 per daily update.

[260] *See* Opinion, *Petition of AT&T Communications, Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Pacific Bell*, Application 96-08-040, at 12 (October 31, 1996).

[261] This amount assumes 125 million listings nationwide and a 10 percent monthly churn rate: $0.01 * 125 million listings * 10 percent * 12 months = $12.5 million.

[262] *See First Report and Order* ¶ 292. Of course, incumbent LECs cannot provide customer information or allow customer information to be used in a manner that would violate Section 222 of the Act. *See First Report and Order* ¶ 535. But to the extent the incumbent LEC may lawfully make directory listing information available to the public, a similar practice by a CLEC would not be unlawful. Therefore, if the incumbent LEC posts directory listings on the Internet, the CLEC should be permitted to do the same. Further, if the Commission allows incumbent LECs to withhold an unlisted customers' telephone numbers from CLECs, the Commission still should require the incumbent LEC to include unlisted customers' names and addresses with an
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The Commission, then, explicitly should state that this procompetitive rule applies equally to directory listings.

For all these reasons, it is not surprising that the Commission required incumbent LECs to provide unbundled access to their directory assistance databases in the *First Report and Order*.[263] The Commission should reaffirm that decision and clarify that (i) CLECs may obtain the initial directory listings and nondiscriminatory updates, in daily electronic batch files at TELRIC, (ii) CLECs may obtain emergency listings and nondiscriminatory updates on the same terms that the incumbent LEC provides such updates to itself, and (iii) incumbent LECs cannot impose restrictions on their directory listings when purchased by CLECs.

### H. Operations Support Systems

The Commission has repeatedly emphasized the critical need for CLECs to have access to incumbent LECs' operations support systems. Thus, there is no question that the Commission should continue to require incumbent LECs to provide nondiscriminatory access to OSS under the existing standards it has developed in the *First Report and Order* and in its decisions on BOC applications under section 271. Access to OSS is complementary to all other unbundled network elements: Indeed, those elements will not be truly available to CLECs unless CLECs can access the incumbent's OSS to perform "the vital tasks of pre-ordering, ordering, provisioning, maintenance and repair, and billing." *Local Competitive Order* ¶ 518; *see id.* ¶ 517; *Ameritech Michigan Order* ¶ 132. Unbundled access to OSS is the only method by which CLECs can

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indicator that they are unlisted, so that like the incumbent they will be able to identify that party as an unlisted to a caller requesting directory information.

[263] *See First Report and Order* ¶ 538.

perform these essential functions, and the existing records in this docket and in dockets for BOC section 271 applications fully support the Commission's conclusion that "it is absolutely necessary for competitive carriers to have access to operations support systems functions in order to successfully enter the local services market." *First Report and Order* ¶ 521; *see also id.* ¶ 522 (access to OSS is "critical" and "essential"); *Ameritech Michigan Order* ¶¶ 129-43; *BellSouth South Carolina Order* ¶ 82.[264]

In each of these decisions, the Commission identified numerous reasons why CLECs would be "severely disadvantaged, if not precluded altogether, from fairly competing" without nondiscriminatory access to OSS. *First Report and Order* ¶ 518. For example, it found that "much of the information maintained by these systems" – such as "available telephone numbers, service interval information, ... maintenance histories," and the "facilities and services assigned to a particular customer" – "is critical to the ability of other carriers to compete." *Id.*; *see also AT&T v. Iowa Utils Bd.*, 119 S. Ct. at 734 (OSS "contains essential network information"). Because OSS "determines, in large part, the speed and efficiency" with which carriers "can market, order, provision and maintain telecommunications services and facilities," OSS are a "significant potential barrier to entry" to which CLECs must have access to be able to provide competing local services. *First Report and Order* ¶ 516. Therefore, the Commission should re-affirm that incumbent LECs must unbundle their OSS and that the Commission's existing tests requiring parity of access will continue to be applied in determining whether incumbent LECs have met the nondiscrimination standard.

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[264] Memorandum Opinion and Order, *Application of BellSouth Corp., et al., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In South Carolina*, 13 F.C.C. Rcd 539 (1997) ("*BellSouth South Carolina Order*")..

## V. THE COMMISSION SHOULD REINSTATE RULES 315(c)-(f) ON NETWORK ELEMENT COMBINATIONS AND RULES 305(a)(4) AND 311(c) ON SUPERIOR QUALITY ACCESS AND INTERCONNECTION.

The *Notice* correctly observes that "[t]he ability of requesting carriers to use . . . combinations of unbundled network elements is integral to achieving Congress' objective of promoting rapid competition in the local telecommunications market."[265] In order to enable competitive carriers to use such combinations, it is critical that the Commission reinstate Rules 315(c)-(f). Those rules would require incumbent LECs, where technically feasible and for appropriate cost-based compensation, to combine their network elements with one another and with CLEC facilities when the CLEC so requests. Reimposition of that obligation is essential to implement the statutory requirement of non-discrimination. Further, given the incumbent LECs' refusal to permit CLECs direct access to their facilities, readoption of those rules is the only way to ensure that CLECs have the practical ability to obtain certain combinations at all.

The Commission has held that Section 251(c)(3)'s non-discrimination requirement means that the access "provided by an incumbent LEC must be at least equal-in-quality to that which the incumbent LEC provides to itself."[266] Because incumbent LECs will combine elements for themselves in any instance in which combining would improve their ability to provide service efficiently, the non-discrimination obligation requires them likewise to combine elements for a CLEC using UNEs when the CLEC makes a similar determination. Such a requirement is also sound public policy. Because CLECs would compensate the incumbent LEC for the economic cost of combining, they would only make such a request when combining would be pro-competitive and efficient. Correlatively, because the incumbent LECs would be fully

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[265] *See Notice*, ¶ 2.

[266] *See First Report and Order*, ¶ 312; 47 C.F.R. § 51.311(b).

compensated for any combining they do, the only purposes those LECs would have for refusing to combine elements would be anticompetitive purposes: to raise CLECs' costs, frustrate their ability to use network element combinations, and degrade their ability to provide competitive service.

For example, CLECs have sought, and many incumbent LECs have refused to provide, a network element configuration known as "enhanced extended links" ("EELs"). EELs are designed to enable CLECs to provide service to customers that are served out of a LEC central office where, for reasons of economics or space limitations, the CLEC has not established a collocation arrangement. An EEL consists of the customer□s loop to that central office, dedicated transport from that central office to one in which the CLEC is collocated, and the multiplexing and concentration in the incumbent's office that is necessary for the CLEC efficiently to transport its customers' traffic to its network.

The "combining" that an incumbent LEC must do to provide an EEL to a CLEC is no different from the combining that it routinely does for itself and for its access customers. For example, incumbent LECs place multiplexing equipment on their loops whenever such equipment is useful in efficiently engineering their local networks, and regularly combine loops and dedicated transport in providing exchange access services. If incumbent LECs refuse to combine elements and thus refuse to permit CLECs to purchase EELs, however, CLECs that provide their own switching would have to collocate in every central office serving a customer. Given the costs, delays, and space limitations associated with collocation (*see supra* p. 96), that would render it needlessly costly to serve some customers, and infeasible to serve others.

Similarly, as noted *supra* pp. 82-83, some incumbent LECs have claimed that, even where they would routinely extend their facilities to connect their network to a new building in

an area they already serve if the customer places an order with them, they will not do so if the CLEC requests an unbundled loop to that same customer. In addition to claiming that they have no obligation to provide such network elements because the extension has not yet been added to their networks, these incumbent LECs would presumably also claim that, in the absence of Rules 315(c)-(f), they would have no obligation to connect such a loop to the rest of their network.

The *First Report and Order* recognized "the practical difficulties of requiring requesting carriers to combine elements that are part of the incumbent LEC□s network" – indeed, it found that such combining was "in practice . . . impossible" without the incumbent LEC's assistance – and properly held that Rules 315(b)-(f) were necessary to assure nondiscriminatory treatment.[267] The Eighth Circuit invalidated Rules 315(b)-(f) in *Iowa Utilities Board*, but its holding on Rule 315(b) has been explicitly reversed by the Supreme Court (*see Iowa Utils. Bd.*, 119 S. Ct. at 724-25), and, as shown below, its holding on Rules 315(c)-(f) was based on three interrelated grounds that have all been fatally undermined by that decision or other subsequent events.

First, the Eighth Circuit applied a highly restrictive standard of review to the Commission's rules. The Eighth Circuit concluded that Section 2(b) of the Communications Act prohibited any FCC rule relating to intrastate services except to the extent that the rule implemented unambiguous terms of the Act that applied to intrastate services (and explicitly gave the FCC jurisdiction over those services).[268] As the Commission recently explained in addressing the need for further proceedings on Rules 315(c)-(f), 305(a)(4), and 311(c):

> In addressing those rules in *IUB v. FCC*, [the Eighth Circuit] started from the premise that the general grants of rulemaking authority contained in 47 U.S.C. §§ 154(i), 201(b) & 303(r), which broadly empower the FCC to adopt rules that are

[267] *See First Report and Order*, ¶¶ 293-294.

[268] *See Iowa Utils. Bd.* v. *FCC*, 120 F.3d at 796-800.

> *not inconsistent* with the requirements of the Act and that reasonably implement its objectives, were simply inapplicable to the local competition provisions of the Telecommunications Act of 1996. *IUB v. FCC*, 120 F.3d at 795, 798 & n.18. Th[e Eighth Circuit] thus did not apply the standard of review of FCC rules that has been set forth in many Supreme Court decisions construing these general grants of rulemaking jurisdiction. *See National Broadcasting Co. v. FCC*, 319 U.S. 190, 216-220 (1943); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-78 (1968); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 793-94 (1978).[269]

Second, the Eighth Circuit held that Section 251(c)(3) "unambiguously indicates that requesting carriers will combine the unbundled elements themselves."[270] In the Eighth Circuit's view, the "plain meaning" of Section 251(c)(3)'s requirement that network elements be provided on an "unbundled" basis, and "in a manner that allows requesting carriers to combine" them, was that network elements would be provided by incumbent LECs in disconnected form and CLECs would then do the combining. This was the basis for its invalidation of both Rule 315(b) and Rules 315(c)-(f).[271]

Third, although both the Commission and CLECs argued that Rules 315(b)-(f) were necessary because incumbent LECs would never actually permit CLECs the direct access to their networks that would be necessary if CLECs were required to do the combining, the Eighth Circuit assumed that was wrong. It stated that "the fact that the incumbent LECs object to this rule indicates to us that they would rather allow entrants access to their networks than have to rebundle the unbundled elements for them."[272]

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[269] *See Iowa Utils. Bd.* v. *FCC*, Response of Federal Respondents to Local Exchange Carriers' Motion Regarding Further Proceedings on Remand and Motion for Voluntary Partial Remand, No. 96-3321, 8th Cir. pp. 11-12 (filed March 2, 1999) (emphasis in original) ("FCC Response").

[270] *See Iowa Utils. Bd.* v. *FCC*, 120 F.3d at 813.

[271] *See id.*

[272] *See id.*

Each of those conclusions has been either reversed or disproved. First, the Supreme Court reaffirmed that the FCC's general rulemaking authority under Section 201(b) applies to the local competition provisions of the Act, and held that Section 2(b) is inapplicable to those provisions.[273] As the Commission has explained, the Court thus "rejected [the Eighth Circuit's] view that the FCC's pertinent authority with respect to the local competition provisions was limited to the power . . . to adopt narrow interpretative rules. All rules that were previously vacated (and not expressly reinstated by the Supreme Court) must thus now be assessed under the standard of review prescribed by Section 201(b) and the Act's other general grants of rulemaking authority."[274] Thus, for example, because the Eighth Circuit had believed that the Commission under Section 2(b) could only interpret and apply the precise language of the Act insofar as it relates to intrastate services, it had read Section 251(c)(3)'s provision requiring incumbent LECs to "allow[] requesting carriers to combine" network elements as establishing the outer limits of what the Commission could order incumbent LECs to do.[275] By contrast, had it recognized the Commission's general rulemaking authority under Section 201(b) and applied the standard of review employed in *Southwestern Cable* and other pertinent cases, it would have asked whether the Commission's rules requiring incumbent LECs to combine network elements reasonably implemented the Act's objectives and were not inconsistent with the Act's terms – a standard of review under which the rules would have easily been upheld.

Second, as the Commission has likewise explained:

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[273] *See Iowa Utils. Bd.*, 119 S. Ct. at 729-733.

[274] *See* FCC Response, p. 13.

[275] *See Iowa Utils. Bd.* v. *FCC*, 120 F.3d at 813.

> the Supreme Court specifically reversed [the Eighth Circuit's] vacation of Rule 315(b), which was premised upon substantially the same analysis that the Court employed with respect to Rules 315(c) - (f). In particular, the Supreme Court rejected claims that the second sentence of Section 251(c)(3) – providing that network elements be made available in a manner that "allows requesting carriers to combine" them – had a plain meaning that incumbents could only be required to provide network elements in physically separated pieces and could not be required to do the combining themselves. *AT&T v. IUB*, 119 S. Ct. at 737. Instead, the Supreme Court stressed that "§ 251(c)(3) is *ambiguous* on whether leased elements may or must be separated," leaving the FCC free, under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to adopt rules that reasonably implement[] the provision in light of statutory goals. *AT&T v. IUB*, 119 S. Ct. at 737 (emphasis added)."[276]

Moreover, the Supreme Court reinstated Rule 315(b) on the ground that "unbundling" was a pricing term, not a requirement of physical separation, and held that the rule was "entirely rational, finding its basis in § 251(c)(3)'s nondiscrimination requirement."[277] That requirement was the basis for both Rule 315(b) and Rules 315(c)-(f), for all these rules rest on a single set of findings that new entrants would otherwise incur higher costs than the LECs do themselves.[278]

Third, the Eighth Circuit's assumption that the LECs were acting in good faith and would permit direct access to their networks in the event Rules 315(c)-(f) were vacated has proven erroneous, for the LECs have refused to allow such access. For example, Bell Atlantic, in defending its rejection of requests for direct access, has argued as follows:

> RCN demands that the Commission require BA-MD to provide CLECs with direct physical access to BA-MD's central office cross-connect panels for CLEC employees to connect (combine) unbundled network elements. There are, however, already 5 CLECs collocating in Maryland, and more can be expected. The Commission should not allow employees from all these CLECs, with wire snips and screwdriver in hand, to work on common distributing frames and equipment that provides service to BA-MD's customers, and to other CLECs.

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[276] *See* FCC Response, p. 13.

[277] *See Iowa Utils. Bd.*, 119 S. Ct. at 737.

[278] *See First Report and Order*, ¶¶ 292-297.

> This would risk a service quality, network reliability, and liability disaster. Inevitably, CLEC employees, who have no responsibility for the overall operation of the central office, will at some point disrupt services to BA-MD end users or to other CLECs. Ultimately, however, it is BA-MD which is responsible for the effective operation of the central office for all of its end user and CLEC customers, who would be called upon to answer to this Commission. Accordingly, BA-MD cannot relinquish its control over these facilities to unsupervised access and work on network facilities by dozens of certificated CLECs.[279]

BellSouth, in one of its recent Section 271 proceedings, likewise advised the Commission that "[d]irect access to BellSouth's main distributing frame or other central office equipment would constitute an unwarranted and illegal intrusion into BellSouth's property."[280] And SBC has taken the same position.[281]

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[279] *See* Statement of Donald E. Albert, p., 12, ¶ 23 Reply Comments of Bell Atlantic - Maryland, Inc., *In the Matter of the Petitions for Approval of Agreements and Arbitration of Unresolved Issues Arising Under § 252 of the Telecommunications Act of 1996*, Public Service Commission of Maryland, Case No. 8731, Phase II(e) (filed Dec. 24, 1997).

[280] *See* Reply Affidavit of Alphonso J. Varner on Behalf of BellSouth, *Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121 (August 26, 1998), p. 14. BellSouth also stated:

> Apparently, the DOJ and some CLECs believe that parties other than BellSouth should be given direct access to BST's main distributing frame. Such direct access is not reasonable due to the potential risks to the public switched network posed by allowing CLECs to make connections on BellSouth's equipment and facilities in the central office – risks which far outweigh any advantages to the CLECs. . . . For this reason, BellSouth restricts access to its central office equipment to a small number of highly trained individuals. The integrity and reliability of the public switched network would be jeopardized to the same extent previously discussed even through supervised access by CLECs to BellSouth's distribution frame.

*Id.* p. 13.

[281] Specifically, SBC has stated that it:

> continues to believe [it] is inappropriate for customers to have direct access to the Main Distribution Frame (MDF) in order to protect the service of all customers

(continued . . .)

The Commission should therefore re-adopt Rules 315(c)-(f). In so doing, it should make an express finding that, contrary to the Eighth Circuit's assumption, the LECs have refused to grant the direct access to their networks that was a linchpin of the Eighth Circuit's holding. And although the Commission's request to the Eighth Circuit for a "remand" of these rules remains pending (*see Notice*, ¶ 33 n.41), the Commission may re-adopt those rules without awaiting the Eighth Circuit's decision on that request (and may lawfully do so even if the Eighth Circuit denies that request).[282] Any readoption of those rules, like any other rule the Commission might adopt, would of course be subject to judicial review. However, the law and facts to be applied by the Court of Appeals in any such review proceeding would include the Supreme Court's decision in *Iowa Utilities Board* and the subsequent refusals by the LECs to permit direct access, all of which would provide more than ample support to sustain them.

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(. . . continued)

> served from that frame. The MDF is the point in a central office where all equipment comes together to provide services to customers. As such, it is critical that access to this location be controlled in order to assure the reliability of the network. In addition, it is usually not possible to obtain access to the MDF without going through the area where SWBT's switching and transmission equipment is located.

Collaborative Process Rebuttal Affidavit of William C. Deere on Behalf of Southwestern Bell Telephone Company, ¶ 6, *Investigation of Southwestern Bell Telephone Company's Entry into the Texas InterLATA Telecommunications Market*, Project No. 16251 (Public Utility Commission of Texas July 20, 1998).

[282] It is always the case that an agency may re-adopt vacated rules where there have been intervening changes in the law or the facts that provide new support for the lawfulness of the rules. For example, the Commission's original physical collocation rules were invalidated in *Bell Atlantic Tel. Cos.* v. *FCC*, 24 F.3d 1441 (D.C. Cir. 1994). The Commission did not need, however, to go back to the D.C. Circuit and obtain a "remand" to adopt new physical collocation rules when, as a result of a change in the law – the enactment of the 1996 Act – it concluded that it now had the legal authority the D.C. Circuit had previously held that it lacked.

Finally, the Commission should also re-adopt Rules 305(a)(4) and 311(c), which required incumbent LECs, again where technically feasible and for compensation, to provide superior quality access and interconnection when CLECs so request. These rules are supported by many of the same considerations as are Rules 315(c)-(f). First, as with Rules 315(c)-(f), because CLECs will be required to pay the economic cost of providing superior quality access and interconnection, they will only request it where it would be efficient and pro-competitive, and incumbent LECs' only purposes in denying it would be anticompetitive ones. Second, such rules are necessary to effectuate the Act's nondiscrimination requirement, because incumbent LECs will always upgrade their own access whenever they determine it would be advantageous and cost-effective to do so. Third, because the LECs will not permit direct access to their facilities, these rules are the only practical means for CLECs using unbundled network elements to obtain higher quality access.[283]

Moreover, the bases for the Eighth Circuit's decision invalidating those rules has likewise been fatally undermined by the Supreme Court's decision in *Iowa Utilities Board*. As the Commission has observed, the Eighth Circuit's jurisdictional error infected its analysis of the

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[283] Readoption of Rules 305(a)(4) and 311(c) would also have the beneficial effect of foreclosing attempts by incumbent LECs to misapply the holdings vacating those rules as a means of avoiding other pro-competitive measures required by this Commission or state commissions. For example, Bell Atlantic has argued that the Eighth Circuit's vacation of those rules also has the effect of requiring the invalidation of the Commission's rule requiring the conditioning of loops for advanced services – a rule the *Notice* properly proposes to reaffirm (¶ 32). *See* Petition of Bell Atlantic for Partial Reconsideration or, Alternatively, for Clarification, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147 (filed Sept. 8, 1998). U S WEST has argued that the Eighth Circuit's decision forecloses the adoption of performance measures. *See, e.g., U S WEST Communications, Inc.* v. *Allan T. Thoms, et al.*, No. 4-97-CV-70092 (S.D. Iowa Jan. 25, 1999), pp. 16-25 (rejecting claim).

superior quality interconnection rules as well as the combination rules.[284] Further, one of the principal bases for invalidating the superior quality rules was the Eighth Circuit's erroneous belief that "the nondiscrimination requirements contained in . . . the Act do not justify these FCC rules" because those requirements "merely prevent[] an incumbent LEC from arbitrarily treating some of its competing carriers differently than others."[285] As the Supreme Court confirmed when it reinstated Rule 315(b) (and as the Commission held in the *First Report and Order*), that view is manifestly incorrect, for the Act's nondiscrimination requirements mandate not only nondiscrimination vis-a-vis other CLECs, but nondiscrimination vis-a-vis the incumbent LEC as well.[286] These jurisdictional and substantive errors in the Eighth Circuit's holdings, and the fact that CLECs using UNEs would be unable to obtain the direct access needed to provide themselves with superior quality access to the elements of the incumbent LECs' networks on their own, also support reinstatement of Rules 305(a)(4) and 311(c).

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[284] *See* FCC Response, pp. 11-12.

[285] *See Iowa Utils. Bd.* v. *FCC*, 120 F.3d at 813.

[286] *See Iowa Utils. Bd.*, 199 S. Ct. at 737-38; *First Report and Order*, ¶ 312.